WOMBLE CARLYLE SANDRIDGE & RICE
A PROFESSIONAL LIMITED LIABILITY COMPANY

Seventh Floor
1401 Eye Street, N.W.
Washington, DC 20005

Telephone: (202) 467-6900
Fax: (202) 467-6910
Web site: www.wcsr.com

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Howard J. Barr
Direct Dial: (202) 857-4506
Direct Fax: (202) 261-0006
E-mail: hbarr@wcsr.com

October 12, 2004

RECEIVED

OCT 12 2004

Federal Communications Commission
Office of Secretary

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, TW A325
Washington, D.C. 20554

Re: Reply to Opposition to Petition for Reconsideration
MB Docket No. 02-136; RM-10458,
RM-10663, RM-10667, RM-10668

Dear Ms. Dortch:

Transmitted herewith on behalf of Mercer Island School District is an original and four copies of its Reply to Opposition to Petition for Reconsideration in the above-referenced matter.

Should any questions arise concerning this matter, please contact the undersigned.

Respectfully submitted,

Howard J. Barr

Enclosure

cc: Service List

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	
Table of Allotments	)	MB Docket No. 02-136
FM Broadcast Stations	)	RM-10458
Arlington, The Dalles, Moro, Fossil,	)	RM-10663
Astoria, Gladstone, Tillamook, Springfield-	)	RM-10667
Eugene, Coos Bay, Manzanita and Hermiston,	)	RM-10668
Oregon and Covington, Trout Lake, Shoreline,	)	
Bellingham, Forks, Hoquiam, Aberdeen, Walla	)	
Walla, Kent, College Place, Long Beach, Ilwaco	)	
Trout Lake and Mercer Island, Washington[1]	)	

To: Chief, Media Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Womble Carlyle Sandridge & Rice, PLLC.
1401 Eye Street, N.W.
Seventh Floor
Washington, D.C. 20005
(202) 857-4506

[1] MISD submits that the community of Mercer Island should be added to the caption given its proposed allotment of Channel 283A for KMIH(FM) at Mercer Island, Washington.

SUMMARY

Grant of MISD's proposed Class A allotment for KMIH on Channel 283A at Mercer Island will best serve the public interest. MISD's request for a Class A allotment at Mercer Island was first presented in MISD's initial timely filed comments in this proceeding. With its current facilities, KMIH(FM) is the functional equivalent of a fully protected, i.e. primary, Class A FM facility. Adoption of MISD's proposal will merely codify in the rules the current state of affairs. To the extent that grant of the proposal will result in a short spaced allotment, the circumstance is a "highly unusual [one] [that includes] a substantial public benefit to be gained at a minimal cost" warranting grant of a short-spaced allotment.[2]

Joint Petitioners try, but cannot argue around the fact that they abandoned their proposal for Covington, Washington. They have made a mockery of the Commission's processes and procedures and have caused both the parties to this proceeding and the Commission to waste valuable time and resources. Grant of an abandoned allotment request for which they never made any timely expression of interest should not be the reward for such conduct.

Procedural abuses aside, the facts demonstrate that Covington is not entitled to a first local preference within the context of this proceeding. The *Report and Order* here was completely bereft of any analysis on the issue of Covington's independence. Merely reciting the Joint Petitioners' assertions in favor of the proposal does not constitute the careful scrutinization required in such cases.

MISD adduced substantial evidence demonstrating Covington to be merely an appendage of Seattle and the Seattle Urbanized Area. The *Report and Order* did not even pay tribute to

[2] *Hagerstown and Silver Spring, Maryland*, DA 04-523 rel. February 25, 2004)

MISD's evidence much less consider it in the context of this case. Covington's size and proximity to the Seattle Urbanized Area and the central city of Seattle, combined with its coverage of the urbanized area and the evidence on the interdependence criteria demonstrates that Covington is interdependent and therefore not entitled to a first local preference.

Before the
FEDERAL COMMUNICATIONS COMMISSION
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Bellingham, Forks, Hoquiam, Aberdeen, Walla	)	
Walla, Kent, College Place, Long Beach, Ilwaco	)	
Trout Lake and Mercer Island, Washington	)	

To: Chief, Media Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Mercer Island School District ("MISD"), by counsel, hereby submits its Reply to First Broadcasting Investment Partners, LLC's and Mid-Columbia Broadcasting, Inc.'s ("Joint Petitioners") Opposition to MISD's Petition for Reconsideration in the above-captioned matter. The staff's decision here was out of step with Commission precedent and failed to serve the public interest. The following is shown in support thereof:

I. GRANT OF MISD'S REQUEST FOR A CLASS A ALLOTMENT BEST SERVES THE PUBLIC INTEREST

1. Grant of MISD's proposed Class A allotment for KMIH on Channel 283A at Mercer Island will best serve the public interest. MISD has well detailed in this proceeding how KMIH(FM) has been serving the public interest through the airing of programming responsive to

the needs and interests of the Mercer Island community and through the positive learning environment it creates for the students of Mercer Island High School. Grant of its counterproposal will ensure KMIH(FM)'s ability to continue in its tradition of public service to the Mercer Island community.

A. MISD'S COUNTERPROPOSAL WAS TIMELY FILED

2. Joint Petitioners continue to assert the baseless suggestion that MISD's counterproposal was untimely. This is at least the third occasion that Joint Petitioners have raised this argument.

3. MISD's request for a Class A allotment at Mercer Island was first presented in MISD's initial timely filed comments in this proceeding. Unlike Joint Petitioners, KMIH has never abandoned its proposal nor has it vacillated on its commitment to that proposal. Accordingly, the counterproposal was timely submitted and ripe for consideration in the context of this rule making.

4. Joint Petitioners' Opposition though raises precisely the problem with its own Covington/Kent/Covington proposal. Joint Petitioners argue that, had MISD's Mercer Island counterproposal been untimely, it would not be entitled to consideration because it would have introduced a new community into the proceeding after the comment deadline.[3] As discussed above, the MISD counterproposal was timely submitted prior to the July 29, 2002 comment deadline. The same cannot be said for Joint Petitioners' and the submission of their various proposals in this proceeding.

5. Joint Petitioners originally proposed to relocate KMCQ from The Dalles, Oregon to Covington, Washington. On the comment/counterproposal deadline, Joint Petitioners joined

[3] Opposition at p. 5, *citing Corpus Christi and Three Rivers, Texas*, 11 FCC Rcd 517 (1996).

with Saga Broadcasting to file a new proposal, seeking instead to move KMCQ to Kent, Washington. **Joint Petitioners expressed no continuing interest in the Covington allotment.**

6. Joint Petitioners vigorously prosecuted the Kent proposal for nearly two years, even going so far as to seek expedited processing of the proposal. Following the issuance of a Show Cause Order[4] directing Saga to show cause why the KAFE license should not be modified to accommodate Triple Bogey, LLC's Aberdeen to Shoreline allotment proposal, without expressing any reason Joint Petitioners abandoned the Kent proposal.

7. In concert with the abandonment of the Kent counterproposal, over the objection of both Triple Bogey and MISD, Joint Petitioners sought to reinstate the previously abandoned Covington proposal. MISD does not dispute Joint Petitioners' right to dismiss their Kent proposal. That voluntary decision, however, does not give rise to the right to reinstate a proposal abandoned nearly two years prior. The refusal to comply with a Commission order was not the type of event sufficient to justify reinstatement of that proposal.[5] This new Covington proposal was grossly out of time, introduced a new community into the proceeding after the comment deadline and should not have been entitled to consideration.[6]

B. COMMISSION RULES AND POLICIES SUPPORT GRANT OF THE REQUESTED CHANNEL 283A ALLOTMENT AT MERCER ISLAND

8. A channel spacing study is unnecessary in this situation since the proposed allotment is not a "new" allotment. KMIH now operates on 104.5 MHz with 30 watts of power and a 60

[4] *Order to Show Cause*, DA 04-607, released March 12, 2004. The *Show Cause Order* directed Saga and Joint Petitioners to disclose the consideration Saga was to receive under an agreement with Joint Petitioners given the modification to KAFE sought by Triple Bogey was consistent with the modification contemplated in the agreement between Joint Petitioners and Saga. Saga declined to disclose the information.

[5] *Taccoa, Sugar Hill and Lawrenceville, Georgia*, 16 FCC Rcd 21191 (MMB 2001). The policy, adopted in *dicta* in that case, requires a "careful[] review" of a rulemaking proponent's counterproposal and an "explanation, **such as unforeseen circumstances**," as to why the new proposal could not have been advanced in the initial petition for rule making. Joint Petitioners never supplied the requisite explanation to support the Kent proposal in lieu of the Covington expression of interest and failed to do so again when it voluntarily abandoned Kent for Covington.

[6] *Corpus Christi and Three Rivers, Texas*, 11 FCC Rcd 517 (1996).

dBu (signal strength) contour that stretches over 6 Km from the transmitter site.[7] With its current facilities, KMIH(FM) is the functional equivalent of a fully protected, i.e. primary, Class A FM facility. Adoption of MISD's proposal will merely codify in the rules the current state of affairs.

9. Joint Petitioners argue from a procedural standpoint that the Commission should not rely on MISD's showing of no contour overlap between KMIH(FM) and KAFE(FM), but do not and cannot demonstrate any flaw in that showing. Most noticeably, the only station potentially affected by KMIH(FM)'s operations, i.e., KAFE(FM), has never posed any objection to the MISD proposal. Rejection of the proposal for lack of a spacing study or because the proposal is short spaced to KAFE(FM) will elevate form over substance in contravention of the greater public interest.

10. The de facto demise of KMIH(FM) by virtue of the grant of the KMCQ(FM) proposal establishes a "compelling need" for grant of a waiver of § 73.207 and adoption of the proposed allotment for KMIH(FM) at Mercer Island.[8] Combined with its service in the public interest, the fact that KMIH(FM) currently operates interference free from its present location is a significant factor supporting grant of a waiver.[9] The Audio Division ignored this while failing to explain how such a limited waiver will in any way adversely affect the integrity of the Table of

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[7] Exhibit A, Engineering Statement of Doug Vernier.

[8] The Commission may, on its own motion, waive its rules when good cause is demonstrated. Section 1.3 of the Commission's rules; *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*) (the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis); *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*) Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest). *Bristol, Tennessee*, 46 RR 2d 650, 651 (1979) (waiver warranted where compelling need is demonstrated); *Eatonton and Sandy Springs, Georgia and Anniston and Linville, Alabama*, 6 FCC Rcd 6580, 6584 (1991); *Toms River, New Jersey*, 43 FCC 2d 414, 417 (1973). .

[9] *Metro Telecom, Inc.*, DA 03-2380 (2003) (waiver granted to allow applicant to operate private land mobile radio (PLMR) systems on frequencies that are offset 12.5 kHz from frequencies allotted to the Air-Ground Radiotelephone Service where underlying purpose of rule to prevent interference by ineligible services would not be served in case of station presently operating in the band on an interference free basis).

Allotments. This is a "highly unusual circumstance[] [that includes] a substantial public benefit to be gained at a minimal cost" warranting grant of a short-spaced allotment.[10]

11. The case of KMIH(FM) is a special one. Any deviations from the general rules necessary to accommodate the Mercer Island proposal should be granted in this case.[11] Indeed, the Commission has held "that we will consider waiving strict application of Section 73.207 in limited circumstances, provided that no new short spacings are created, no existing short spacings are exacerbated, and the potential for interference between the currently short spaced stations is not increased."[12] That is precisely the situation presented here. Any necessary waiver and the proposed allotment should have been granted.

12. Given the current KMIH(FM) technical facilities and the level of service it provides to the Mercer Island community, the public interest was and is best served by grant of MISD's proposal in lieu of Joint Petitioners' proposal to relocate a station from its rural market into the Seattle Urbanized Area. Grant of the MISD proposal will provide/maintain a longstanding – truly local -- first local service at Mercer Island. Its grant would not only have resulted in a preferential arrangement of allotments, but one far superior to any other proposed in this docket.

III. JOINT PETITIONERS ABANDONED THEIR COVINGTON PROPOSAL

13. As discussed previously herein, Joint Petitioners abandoned the Covington proposal, a fact that has never specifically been denied. Reinstatement of that proposal under the facts and circumstances of this case was improper. Joint Petitioners reliance on *Gunnison, Colorado*[13] for

[10] *Hagerstown and Silver Spring, Maryland*, DA 04-523 rel. February 25, 2004)
[11] *See Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1157-59("special circumstances warrant a deviation from the general rule [where] such deviation will serve the public interest").
[12] *Newnan and Peachtree City, Georgia* ("*Newnan*"), 7 FCC Rcd 6307 (1992).
[13] *Gunnison, Colorado, et al*, DA 04-2908 (September 20, 2004)

the proposition that the Commission did not have to consider arguments regarding reinstatement of a proposal because it never acted on the withdrawal is both remarkable and unavailing.

14. The assertion is remarkable given the nearly two years that it vigorously prosecuted its Kent proposal (see ¶6) and unavailing because in *Gunnison* the counterproponent had at least timely expressed an interest in the allotment.[14] Joint Petitioners never timely expressed an interest in the Covington allotment as required by longstanding Commission precedent.[15]

15. Joint Petitioners have simply boiled that requirement, as well as the Commission's policy against accepting untimely expressions of interest, down to an irrelevancy.[16] Joint Petitioners contention that *Taccoa, Georgia, et al*,[17] excused it from having to timely express an interest in the Covington allotment is as unavailing as its reliance on *Gunnison, Colorado, et al.* In the former, the staff granted an allotment to Sugar Hill apparently without requiring a continuing expression of interest, however, the facts of that case bear no resemblance to this case.

16. Even a cursory reading of the *Taccoa, Georgia* decision renders it patently obvious that the staff simply missed the lack of an expression of interest and the submission of the petitioner's Lawrenceville counterproposal. The staff's erroneous failure to reject the proposed allotment for lack of an expression of interest is meaningless in the context of this case.

17. Indeed, the sole basis for the petition for reconsideration in *Taccoa* was the staff's grant of the Sugar Hill allotment and its failure to recognize the petitioner's Lawrenceville

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[14] *Id* at n. (3) ("MCB recently filed a Reinstatement of Interest in its counterproposal").
[15] *See Santa Isabel, Puerto Rico and Christiansted, Virgin Islands*, 3 FCC Rcd 2336, 1988, *aff'd*, 4 FCC Rcd 3412 (1989); *aff'd. sub non. Amor Family Broadcasting v. FCC*, 918 F.2d 960 (D.C. Cir. 1990). *See also Butler and Reynolds, Georgia*, 17 FCC Rcd 1653 (MM Bur. 2002).
[16] *See Santa Isabel, Puerto Rico and Christiansted, Virgin Islands*, 3 FCC Rcd 2336, 1988, *aff'd*, 4 FCC Rcd 3412 (1989); *aff'd. sub non. Amor Family Broadcasting v. FCC*, 918 F.2d 960 (D.C. Cir. 1990). *See also Butler and Reynolds, Georgia*, 17 FCC Rcd 1653 (MM Bur. 2002).
[17] *Taccoa, Georgia, et al*, 16 FCC Rcd 14069 (2001), *recon.*, 16 FCC Rcd 21191 (2001)

counterproposal. The Commission only set aside the Sugar Hill allotment after the petitioner pointed out on reconsideration that it had no interest in that allotment. In any event, the petitioner there did not, after abandoning its proposed allotment in favor of an alternative proposal, and after going so far as to seek expedited processing of the alternative allotment, then abandon that proposal for its previously abandoned allotment proposal and claim "no harm, no foul," as Joint Petitioners have done here.

18. The Sugar Hill proposal should have been rejected based upon the petitioner's failure to make the appropriate expression of interest. The Allocations Branch only compounded its error when it went on to create the *Taccoa Policy* -- creating the "perverse incentive"[18] for parties such as Joint Petitioners to play games with the allotment process – when there were other independent satisfactory grounds for the rejection of the Lawrenceville counterproposal.[19]

19. Joint Petitioners' "we would have just re-filed anyway so why bother going through that process" argument likewise fails to hold water. The point is, the Commission does not and will never really know what Joint Petitioners would have done had Joint Petitioners been dismissed for lack of a valid proposal, nor does the Commission know what any other party or non-party would have done following Joint Petitioners' dismissal.

IV. COVINGTON WAS NOT ENTITLED TO A FIRST LOCAL SERVICE PREFERENCE

20. Joint Petitioners contention that the decision below sufficiently established the staff's consideration of the evidence is belied by their failure to point to any example of that

[18] Opposition at p. 10.

[19] *E.g.*, the petitioners lack of an expression of interest and the petitioner's failure to show that the station would provide the requisite 70 dBu signal to Lawrenceville as required by Section 73.315(a) of the Rules. *Taccoa, Georgia, et al,* 16 FCC Rcd at 21191.

consideration. Joint Petitioners fail to do so because no consideration was given to that evidence.[20]

21. Joint Petitioners claim that Covington's size supports grant of a preference, but fail to recognize that size is not all that matters. The issue is "the size **and** proximity of the proposed community to the central city of the urbanized area." Covington may have a 2000 Census population of 13,783, but its size pales in comparison to that of Seattle -- 2000 Census population of 563,374. Covington is less than 2.5% -- or 1/40th of the Size of Seattle. The Seattle Urbanized Area has a 2000 Census population of 2,712,205, making Covington 1/20000 the size of the Urbanized Area. These numbers bear even more significance when placed in the context of Covington's location a mere 9.3 miles from Seattle.

22. Joint Petitioners no longer contend that KMCQ operating from Covington will provide 70 dBu service to only 8.8% of the urbanized area, nor do they dispute Mercer Island's showing that the proposed allotment will provide 70 dBu service to 1,250,325 persons or 46% of the urbanized area and 60 dBu service to 1,875,187 persons or 69% of the urbanized area.

23. Joint Petitioners concede factors 3 and 7 of the *Tuck* interdependence analysis.[21] A majority of the remaining factors also weigh against finding Covington to be independent.

24. As to factor one, Joint Petitioners attempt to contend that the employment figures for Covington are far greater than those of other communities adjudged to be independent. No

[20] The Commission has previously set aside decisions that "ignored record evidence relevant to the issues designated for investigation and lacked sufficient analytical foundation for the findings reached" and must do so here. *Western Union Telegraph Company*, 95 FCC 2d 881, 920 (1983).

[21] Whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; and the extent to which the specified community and the central city are part of the same advertising market. *Faye and Richard Tuck* ("*Tuck*"), 3 FCC Rcd 5374, 5378 (1988).

support exists for this assertion, however, because Joint Petitioners never submitted any evidence on this issue.[22] Factor one therefore favors a finding of interdependence.

25. The South County Journal is not published in Covington and independent sources advise that it serves the southern King County communities of Kent, Auburn, Des Moines, Normandy Park, Sea Tac and Federal Way – no mention of Covington.[23] Factor two therefore favors a finding of interdependence.

26. Nor does Covington have its own zip code. Covington lies within the 98042 zip code, 2000 census population of 38,023 persons, which is the default zip code for Kent.[24] Accordingly factor 5 of the interdependence analysis must be counted against Covington.

27. Covington clearly "relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries."[25] The evidence demonstrates that the police, fire protection, schools and libraries are all provided by King County.[26] Covington is indeed reliant on the larger metropolitan area for these services.[27]

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[22] Joint Petitioners' twist MISD's showing on this issue when they state that the "evidence [shows] that 35 percent of Covington's civilian labor force and 18 percent of its total labor force work in Covington." Rather, MISD showed that those percentages merely represent the upper limit of the relevant labor force that can work in Covington **and not actual percentages**. Indeed, Joint Petitioners have conceded that the actual figure is likely far lower. Having failed to produce any evidence on the factor, it must be counted against Covington. Joint Petitioners' assertion that *Pleasonton, Bandera Hondo and Schertz, Texas*, 15 FCC Rcd 3068, 3071 (2000) is *dicta* is curious since the issue of whether and to what extent residents of a community work in that community is central to a *Tuck* analysis and cannot be considered *dicta*. Given Covington's proximity to Seattle and the Seattle Urbanized Area and the significant size disparity between them, Joint Petitioners failure to demonstrate that a majority of Covington's workforce also resides there is significant and weighs against a finding of independence.

[23] See Joint Comments at Attachment V.Under Joint Petitioners' analysis, the Prince George's County (Maryland) Journal which is also not a Seattle paper, would stand in favor of an independence finding.

[24] Joint Petitioners do not contend that Covington has its own phone book.

[25] The reference to "larger metropolitan area rebuts Joint Petitioners contention that the analysis should be focused only on whether services are provided by Seattle.

[26] "King County has 19 school districts, serving over 250,000 students in grades K through 12."http://www.edc-sea.org/research_data/quality_education.cfm. The Kent School District is King County's second largest.

[27] King County and Seattle have a commonality of interest represented by the 1994 merger of King County and the Municipality of Metropolitan Seattle

28. Given the signal population coverage of Joint Petitioners' reallotment proposal and Covington's size and proximity to the Seattle Urbanized Area, Joint Petitioners' showing under the third *Tuck* criterion falls well short of establishing that Covington is independent of the much larger central city of Seattle and the Seattle Urbanized Area.[28]

Conclusion

Wherefore, the premises considered, Mercer Island School District respectfully requests reconsideration of the *Report and Order*, that Joint Petitioners' proposed reallotment of KMCQ(FM) from The Dalles, Oregon to Covington, Washington be rejected, and that KMIH(FM) be granted a Class A allotment at Mercer Island, Washington.

Respectfully submitted,

MERCER ISLAND SCHOOL DISTRICT

By: _____
Howard J. Barr
Its Counsel

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
1401 Eye Street, N.W.
Seventh Floor
Washington, D.C. 20005
(202)857-4506

October 12, 2004

[28] *Tuck*, 3 FCC Rcd at 5378 ("Although interdependence is the most important consideration under Huntington, the required showing of interdependence between the specified community and the central city will vary depending on the degree to which the second criterion -- relative size and proximity -- suggests that the community of license is simply an appendage of a large central city. When the specified community is relatively large and far away from the central city, a strong showing of interdependence would be necessary to support a Huntington exception. On the other hand, less evidence that the communities are interdependent would be required when the community at issue is smaller and close to the central city"). Factors 1, 2, 3, 5, 7 and 8 of the interdependence analysis weigh in favor against Covington. The only two factors that can possibly weigh in favor of Covington are factors 4 and 6. Accordingly, only a minority of the Tuck factors favor finding Covington independent from Seattle and the Seattle Urbanized Area. Given Covington's diminutive size in relation to Seattle and its close proximity to Seattle, the evidence here more than establishes interdependence.

CERTIFICATE OF SERVICE

I, Howard J. Barr, do hereby certify that I have on this 12th day of October, 2004, caused to be hand delivered or mailed via First Class Mail, postage prepaid, copies of the foregoing Reply to Opposition to Motion for Stay to the following:

John A. Karousos *
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W., Room 3-A266
Washington, D.C. 20554

R. Barthen Gorman *
Audio Division
Mass Media Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W., Room 3-A224
Washington, D.C. 20554

Mark N. Lipp, Esq.
Vinson & Elkins L.L.P.
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-1008
Counsel for First Broadcasting Company, LP

J. Dominic Monahan, Esq.
Luvaas Cobb Richards & Fraser, PC
777 High Street, Suite 300
Eugene, OR 97401
Counsel for Mid-Columbia Broadcasting, Inc.

Gary S. Smithwick, Esq.
Smithwick & Belendiuk, PC
5028 Wisconsin Avenue, N.W., Suite 301
Washington, D.C. 20016
Counsel for Saga Broadcasting Corp.

M. Anne Swanson, Esq.
Nam E. Kim, Esq.
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, D.C. 20036
Counsel for New Northwest Broadcasters, LLC

Matthew H. McCormick, Esq.
Reddy, Begley & McCormick, LLP
1156 15th Street, N.W., Suite 610
Washington, D.C. 20005-1770
Counsel to Triple Bogey, LLC, et al

Howard J. Barr

* Hand Delivered